Pendakwa Raya v Wong Haur Wei

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41–7 OF 2002
LOW HOP BING J
4 OCTOBER 2007

Criminal Law — Immigration Act (Malaysia) — s 55B(1) — Ingredients of offence — Appropriate sentence upon conviction — Immigration Act (Malaysia) s 55B(1)

Criminal Procedure — Defence — Evidence — Mistake of fact — Principles governing mistake of fact — Whether burden of proving mistake of fact upon the accused — Evidence Act 1950 s 107

Criminal Procedure — Sentence — Employing person not in possession of valid pass — Accused married with four dependants — Suitable sentence, assessment of — Immigration Act (Malaysia) s 55B(1)

Evidence — Burden of proof — Criminal case — General exceptions in the Penal Code — Whether burden upon accused to prove existence of circumstances bringing case within a general exception in the Penal Code — Evidence Act 1950 s 105

Immigration — Offence under Immigration Act 1959/63 — Employing person not in possession of valid pass — Ingredients of offence — Suitable sentence, assessment of — Immigration Act (Malaysia) s 55B(1)

Immigration officers raided the accused person's factory and arrested three foreign workers employed without valid passes. The accused was subsequently charged in the magistrate's court with three counts under s 55B(1) of the Immigration Act 1959/63. The magistrate found that there was a prima facie case for the accused to answer and called him to enter his defence. In his defence, the accused alleged that he was not familiar with the rules and procedures concerning the employment of foreign workers. These matters, he claimed, were handled by his agent — one Christine. Christine had apparently obtained his signature on several documents said to be applications for valid passes for the workers. The accused claimed he did not

understand the contents of those documents which were in Bahasa Malaysia. He further claimed he paid Christine money for her services as an agent. Christine later introduced the three workers to him and he assumed that they had valid passes. He only realized that his three workers had no valid passes and that Christine had cheated him when the immigration officers struck. He tried, albeit unsuccessfully, to locate Christine. Christine was not called as a witness in his defence. The magistrate acquitted and discharged the accused on the grounds that he had a good defence under s 79 of the Penal Code. The accused, held the magistrate, was not conversant with the laws and procedures concerning valid pass applications for foreign workers. Further, the burden of proof remained on the prosecution and the accused did not have to prove that he was cheated by Christine. The DPP appealed to the High Court contending that the magistrate erred in failing to hold that the accused had the burden of proving the exception under s 79 of the Penal Code.

Held, allowing the appeal and convicting the accused as charged:

(1) The prosecution had clearly proved the two ingredients involved in the offence under s 55B(1) of the Immigration Act 1959/63 and the magistrate had correctly found that a prima facie case against the accused had been established (see para 11).

(2) The principles governing s 79 of the Penal Code may be stated as follows: (i) the mistake must be a mistake of fact and not a mistake of law; (ii) the mistake of fact must be made in good faith — the test of good faith is as prescribed under s 52 of the Penal Code — the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention, ie it was a reasonable mistake to make; (iii) where the accused is acting under the instruction of a third person, the accused must prove that he is sincerely mistaken in fact, in thinking that the third person was acting bona fide; and (iv) under s. 105 of the Evidence Act 1950, the burden of proving the existence of circumstances bringing a case within the general exceptions in the Penal Code (such as under s 76) is upon the accused person, and the court shall presume the absence of such circumstances (see para 26); *Mallal's Penal Law* (2002, Malayan Law Journal Sdn Bhd); *Tan Khee Wan Iris v Public Prosecutor* [1995] 2 SLR 63); *Arumugam & Another v Rex* [1947] MLJ 45 and *Public Prosecutor v Teo Eng Chan & Ors* [1988] 1 MLJ 156 followed.

(3) In the instant case, the magistrate erred in holding that for the purposes of establishing the defence under s 79, the burden was on the prosecution to prove the case against the accused. The settled law dictated that the burden of proof in the instant case be cast upon the

accused to prove his defence under s 79, on a balance of probabilities. The magistrate had further erroneously treated the accused person's ignorance of the laws and procedures concerning foreigner valid pass applications, as a mistake of fact when it was a mistake of law — specifically excluded under s 79 of the Penal Code (see paras 30–31).

(4) Upon recording a conviction and after considering mitigation, an appropriate sentence would be a fine of RM10,000 for each charge (see paras 33–36).

[Bahasa Malaysia summary

Pegawai-pegawai imigresen telah membuat serbuan kilang tertuduh dan menangkap tiga pekerja asing yang diambil bekerja tanpa permit sah. Tertuduh kemudiannya telah dituduh di mahkamah majistret dengan tiga pertuduhan di bawah s 55B(1) Akta Imigresen 1959/63. Majistret mendapati bahawa terdapat kes prima facie untuk tertuduh jawab dan memanggilnya untuk memasukkan pembelaan. Dalam pembelaannya, tertuduh mendakwa bahawa beliau tidak peka dengan peraturan dan prosedur berkaitan pengambilan bekerja pekerja-pekerja asing. Perkara tersebut, beliau dakwa, telah dikendalikan oleh ejennya — Christine. Christine dikatakan telah mendapatkan tandatangannya untuk beberapa dokumen yang dikatakan permohonan-permohonan untuk permit sah pekerja. Tertuduh mendakwa bahawa beliau tidak memahami kandungan dokumen-dokumen tersebut yang mana adalah dalam Bahasa Malaysia. Beliau seterusnya mendakwa bahawa beliau telah membayar Christine wang untuk perkhidmatannya sebagai ejen. Christine kemudiannya telah memperkenalkan tiga pekerja kepadanya dan beliau membuat anggapan bahawa mereka telah memperoleh permit sah. Beliau hanya menyedari bahawa ketiga-tiga pekerjanya tiada permit sah dan bahawa Christine telah menipunya apabila pegawai-pegawai imigresen bertindak. Beliau cuba, meskipun tidak berjaya, untuk mencari Christine. Christine tidak dipanggil sebagai saksi dalam pembelaannya. Majistret telah melepas dan membebaskan tertuduh atas alasan bahawa beliau mempunyai pembelaan kukuh di bawah s 79 Kanun Keseksaan. Tertuduh, seperti yang diputuskan oleh majistret, tidak peka dengan undang-undang dan prosedur berkaitan permohonan permit yang sah untuk pekerja asing. Tambahan pula, beban bukti terletak atas pihak pendakwaan dan tertuduh tidak perlu membuktikan bahawa beliau telah ditipu oleh Chiristine. TPR merayu ke Mahkamah Tinggi dengan menegaskan bahawa majistret telah terkhilaf kerana gagal memutuskan bahawa tertuduh mempunyai beban untuk membuktikan pengecualian di bawah s 79 Kanun Keseksaan.

Diputuskan, membenarkan rayuan dan mensabitkan tertuduh seperti yang dituduh:

(1) Pihak pendakwaan jelas telah membuktikan dua faktor yang terlibat

dalam kesalahan di bawah s 55B(1) Akta Imigresen 1959/63 dan majistret telah dengan sewajarnya mendapati bahawa satu kes prima facie terhadap tertuduh telah dibuktikan (lihat perenggan 11).

(2) Prinsip-prinsip yang mengawal s 79 Kanun Keseksaan boleh dinyatakan seperti berikut: (i) kesilapan itu hendaklah merupakan satu kesilapan fakta dan bukan satu kesilapan undang-undang; (ii) kesilapan fakta hendaklah dibuat dengan niat baik — ujian untuk niat baik adalah seperti yang ditetapkan di bawah s 52 Kanun Keseksaan — pembelaan tidak dapat dibuktikan kecuali jika dapat ditunjukkan atas imbangan kebarangkalian bahawa perayu telah mengamalkan sikap berhati-hati dan prihatin, iaitu ia satu kesilapan munasabah yang telah dibuat; (iii) di mana tertuduh bertindak di bawah arahan pihak ketiga, tertuduh hendaklah membuktikan bahawa beliau secara ikhlas telah membuat kesilapan fakta, dengan memikirkan bahawa pihak ketiga bertindak bona fide; dan (iv) di bawah s 105 Akta Keterangan 1950, beban untuk membuktikan kewujudan keadaan yang membawa kepada satu kes dalam lingkungan pengecualian am dalam Kanun Keseksaan (seperti di bawah s 76) terletak ke atas tertuduh, dan mahkamah akan mengandaikan ketiadaan keadaan sedemikian (lihat perenggan 26); *Mallal's Penal Law* (2002, Malayan Law Journal Sdn Bhd); *Tan Khee Wan Iris v Public Prosecutor* [1995] 2 SLR 63); *Arumugam & Another v Rex* [1947] MLJ 45 dan *Public Prosecutor v Teo Eng Chan & Ors* [1988] 1 MLJ 156 diikut.

(3) Dalam kes semasa, majistret terkhilaf dalam memutuskan bahawa bagi tujuan membuktikan pembelaan di bawah s 79, beban terletak atas pihak pendakwaan untuk membuktikan kes terhadap tertuduh. Undang-undang tetap menetapkan bahawa beban bukti dalam kes semasa terletak atas tertuduh untuk membuktikan pembelaannya di bawah s 79, atas imbangan kebarangkalian. Majistret telah terkhilaf dengan menganggap tertuduh tidak peka kepada undang-undang dan prosedur berkaitan permohonan permit sah pekerja asing, sebagai satu kesilapan fakta padahal ianya merupakan satu kesilapan undang-undang — secara khusus dikecualikan di bawah s 79 Kanun Keseksaan (lihat perenggan 30–31).

(4) Setelah merekodkan sabitan dan selepas mengambilkira mitigasi, hukuman sesuai adalah denda sebanyak RM10,000 untuk setiap pertuduhan (lihat perenggan 33–36).]

Notes

For a case on employing person not in possession of valid pass under criminal procedure, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3636.

For a case on employing person not in possession of valid pass under immigration, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4025.

For a case on s 55B(1) of the Immigration Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 703.
For cases on criminal cases in evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 391–406.
For cases on evidence of defence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras1715–1716.

Cases referred to

Arumugam & Another v Rex [1947] MLJ 45 (folld)
Lim Chin Aik v Regina [1963] MLJ 50 (refd)
PP v Koo Pui Fong [1996] 2 SLR 266 (refd)
PP v Mohammed Faizal Shah [1998] 1 SLR 333 (refd)
PP v Sainal Abidin Mading [1998] 3 CLJ 41 (refd)
PP v Teo Eng Chan & Ors [1988] 1 MLJ 156 (folld)
Tan Khee Wan Iris v PP [1995] 2 SLR 63 (folld)
Thyagarajan v. PP [1987] 2 MLJ 284 (refd)

Legislation referred to

Evidence Act 1950 s 107
Immigration Act 1959/63 s 55B(1)
Penal Code ss 52, 79

Appeal from: 83–738 of 2000 (Magistrate's Court, Melaka)

Maziah bte Abu (Deputy Public Prosecutor, Pejabat Penasihat Undang-Undang Negeri Melaka) for the prosecution.
Yap Boon Hau (Mok Lay Yong with him) (Lee Hishammuddin) for the defence.

Low Hop Bing J (now JCA):

APPEAL

[1] This is the prosecution's appeal against the decision of the learned magistrate ('the magistrate') who had on 29 January 2002 acquitted and discharged the accused of all the three charges at the close of the defence case.

[2] The three charges preferred against the accused are in relation to the employment on 28 October 2000, in the accused's factory in Bukit Rambai Industrial Area Phase IV ('the factory') of three male Indonesian citizens viz Sahuri, 21 years old; Isnan Wartijo, 33 years old; and Rohadi bin Gondokusumo, 28 years old (collectively 'the foreign workers') when they

were not in possession of valid passes, contrary to and punishable under s 55B(1) of the Immigration Act 1959/63 as amended in 1997 ('s 55B(1)').

ESSENTIAL INGREDIENTS

[3] Section 55B(1) creates the offence in the following words:

> **55B. Employing a person who is not in possession of a Valid Pass**
>
> Any person who employs one or more persons, other than a citizen or a holder of an Entry Permit, who is not in possession of a valid Pass shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit for each such employee.

[4] The essential ingredients of the offence are:

1 employs a person; and

2 that person is not in possession of a valid pass.

EMPLOYS A PERSON

[5] All three foreign workers testified in the magistrate's court that they were working in the factory and were paid their salary. They stayed in the accused's staff quarters. They were arrested by a team of immigration officers who raided the factory on 28 October 2000. They were subsequently charged in court. Upon pleading guilty, each of them was sentenced to six months imprisonment and fined RM2,000 or two months imprisonment in default. They have respectively served their sentences. There is no doubt that the prosecution has proved this ingredient.

VALID PASS

[6] Evidence adduced at the trial revealed that none of the foreign workers employed in the factory was able to produce any valid pass. SP7 the assistant director in the Kuala Lumpur Immigration Head Office confirmed that his department had not issued any valid pass to the foreign workers.

[7] When Rohadi (SP1), one of the foreign workers, met the accused, he told the accused of his country of origin ie Indonesia. The accused did not ask for SP1's passport, but had instead promised to obtain a valid pass for him, through an agent named Christine. SP1 had never met Christine.

[8] Sahuri (SP2) another foreign worker did not show the accused any valid pass. The accused had again promised SP2 to obtain it through Christine.

[9] SP3 Isnan also did not have a valid pass when he was arrested as a foreign worker in the factory. A

[10] The prosecution had therefore proved this ingredient.

CLOSE OF PROSECUTION'S CASE B

[11] As the two essential ingredients have been established at the close of the prosecution's case, the magistrate has correctly found that a prima facie case has been established against the accused, and the defence was called. C

DEFENCE CASE

[12] In his evidence, the accused admitted that he was the owner of the factory and the foreign workers were his employees. His defence was that he was not familiar with the rule and procedure in the employment of foreign workers, as they were handled by the agents. D

[13] He added that the foreign workers were brought to the factory by Christine who was known to the accused's wife (DW2), and that Christine would charge a fee of RM250 for each foreign worker. The accused first met Christine in August 1999 in his factory and Christine explained to him that she was an agent who could handle matters pertaining to foreign workers. In the course of discussion, Christine gave him some documents for recruiting foreign workers. Christine completed the particulars in the documents for that purpose. Christine signed on and affixed her company rubber stamp to those documents. After discussion, the accused agreed to take Christine as the agent and made a payment of RM1,000, for which Christine had acknowledged receipt. E F

[14] The accused signed the documents given by Christine purportedly as application forms for the pass, but he actually did not understand what he had signed as the forms were in Bahasa Malaysia. However Christine did explain to the accused that it was to apply for valid passes for foreign workers. G

[15] Christine brought the foreign workers to work in the factory. After the team of immigration officers raided the factory, the accused attempted to locate Christine but was unsuccessful. It was only then that the accused knew that the foreign workers brought in by Christine did not have valid passes. The accused assumed that they had them. Christine was not a witness in this case. H I

[16] DW2 and DW3 gave evidence to the same effect as the accused's evidence on the existence of Christine and the accused's execution of the purported application forms.

[17] The magistrate acquitted and discharged the accused, on the grounds that the accused had a good defence under s 79 of the Penal Code as the accused was not conversant with the law and procedure in applying for valid passes for foreign workers and that the burden of proof is always on the prosecution as the accused does not have to prove that he was cheated by Christine into believing that the foreign workers had valid passes.

SECTION 79 OF THE PENAL CODE

[18] Learned deputy public prosecutor Miss Maziah bt Abu submitted that the magistrate erred in failing to hold that the accused bears the burden of proving the exception in s 79, on the strength of:

(1) *Mallal's Penal Law* p 92;

(2) *Arumugam & Another v Rex* [1947] MLJ 45 (HC Singapore);

(3) *Public Prosecutor v Teo Eng Chan & Ors.* [1988] 1 MLJ 156 HC Singapore;

(4) *Tan Khee Wan Iris v PP* [1995] 2 SLR 63 High Court Singapore.

[19] Learned defence counsel Mr Yap Boon Hau assisted by Miss Mok Lay Yong contended that the accused has established the defence under s 79, in that the accused had acted under a mistake of fact that his three workers had valid passes and that he had been misled by Christine, thereby negating mens rea on the part of the accused. They relied on:

(1) *Lim Chin Aik v Regina* [1963] MLJ 50 (PC);

(2) *Thyagarajan v Public Prosecutor* [1987] 2 MLJ 284 (HC Singapore);

(3) *Public Prosecutor v Koo Pui Fong* [1996] 2 SLR 266 (HC Singapore);

(4) *Public Prosecutor v Mohammed Faizal Shah* [1998] 1 SLR 333 (HC Singapore); and

(5) *Public Prosecutor v Sainal Abidin Mading* [1998] 3 CLJ 41 (HC).

[20] Having considered the evidence adduced at the trial, the submissions and the magistrate's grounds of decision, I am of the view that the question for determination in this appeal is whether the court below is correct in the interpretation of s 79.

[21] The relevant portion which provides for the defence of a mistake of fact under s 79 merits reproduction as follows:

79 Nothing is an offence which is done by any person ……. who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

[22] In *Lim Chin Aik*, the Privy Council had not been requested to consider s 79 of the Penal Code.

[23] Next, a careful reading of the judgment of Chua J in *Thyagarajan* revealed that s 79 was never ventilated before the learned judge. Similarly, in *Koo Pui Fong*, s 79 was not the bone of contention before Yong Pung How CJ (Singapore) (as he then was); nor in *Mohammed Faizal Shah*, before the same learned Chief Justice of Singapore.

[24] Again, s 79 was not raised as an issue for determination in *Sainal Abidin Mading*, and hence it did not form part of the judgment of Richard Malanjum J (now CJ (Sabah & Sarawak)).

[25] It is abundantly clear that the above authorities are not of any assistance to the defence.

[26] In my view, the principles governing the defence under s 79 may be stated as follows:

1 The mistake must be a mistake of fact and not a mistake of law, as ignorance of the law is no excuse;

2 The mistake of fact must be made in good faith, and the test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s 52 of the Penal Code ie whether there was due care and attention. The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention ie it was a reasonable mistake to make: per Yong Pung How CJ (Singapore) (as he then was) in *Tan Khee Wan* (see also *Mallal's Penal Law*, Malayan Law Journal Sdn Bhd 2002);

3 Where an accused is acting under the instruction of a third person, the accused must prove that he is sincerely mistaken in fact in thinking that the third person was acting bona fide: per Worley J in *Arumugam and Another*; and

4 Section 79 appears in Chapter IV of the Penal Code dealing with general exceptions. Under s 107 of the Evidence Act 1950, the burden of proving the existence of circumstances bringing a case within the

general exceptions in the Penal Code is upon the accused person and the court shall presume the absence of such circumstances: per Coomaraswamy J (Singapore) in *Teo Eng Chan & Ors*, at p 161C left.

[27] Significantly, by way of illustration, in *Arumugam and Another*, there was evidence that the second defendant and the accused were acting under the instructions of a third person and that they were under a mistake of fact. Hence, their defence under s 79 was sustained.

[28] However, in *Teo Eng Chan & Ors*, the defence under s 79 was rejected as none of the accused had acted in good faith i.e. there was no exercise of due care and attention in committing the mistake of fact.

[29] Under s 79, a mistake of fact in not renewing the licence to provide public entertainment failed as the accused could not show an exercise of due care and attention: see *Tan Khee Wan*.

[30] Reverting to the instant appeal, I find that the magistrate has erred in holding that for the purposes of establishing the defence under s 79, the burden is on the prosecution to prove the case against the accused, when it is settled law that the burden of proof in this case is cast on the accused to prove the defence under s 79 on a balance of probabilities.

[31] In addition, the magistrate, having arrived at a finding that the accused was not conversant with or was indeed ignorant of the law and the procedure in applying for valid passes for the three employees, had treated the mistake of law as a mistake of fact. Mistake of law has been expressly excluded as a defence under s 79.

CONVICTION

[32] In the circumstances, the magistrate's order of acquittal and discharge cannot be upheld. I therefore allow this appeal, set aside the lower court's order of acquittal and discharge and substitute it with a finding of guilty and conviction against the accused.

SENTENCE

[33] In mitigation, it was submitted that the accused is married and has four dependants to support, viz. his wife, their two children and an aged mother. His monthly income is RM5,000 and so prays for a lenient sentence.

[34] The prosecution pressed for an appropriate sentence

[35] Section 55B(1) provides for a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit for employing each of the employees without a valid pass. The process of sentencing involves an exercise of discretion which is to be based on established judicial principles and the factual circumstances prevailing in each particular case.

[36] In this appeal, I am of the view that in the exercise of discretion in the light of the facts herein, justice is seen to be done by imposing a fine of RM10,000 on each charge, and so for three charges, the total fine is RM30,000 which I hereby order accordingly.

Appeal allowed. Accused convicted as charged.

Reported by Andrew Christopher Simon